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Supreme Court of the United States

OCTOBER TERM, 1995

SAUL ORNELAS, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF WISCONSIN, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Wisconsin is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many cases involving the Fourth Amendment. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of significant concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, nonprofit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 8,700 attorneys. The NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to the area of criminal defense and, thus, it speaks for more than 28,000 criminal defense lawyers nationwide. Among other things, the NACDL seeks to promote the proper and fair administration of criminal justice and the continued recognition and adherence to the Bill of Rights which is necessary to sustain the quality of the American system of justice.

STATEMENT OF THE CASE

The facts are not disputed. On the morning of December 11, 1992, Michael Pautz, a Milwaukee, Wisconsin law enforcement officer, observed petitioners' car in a motel parking lot. The car was a two-door 1981 Oldsmobile with

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

California license plates. Pautz noticed the car because older model General Motors cars are allegedly easy to conceal drugs in, and because California is a "source" state for drugs. A police dispatcher informed Pautz that the owner of the car was either Miguel Ledesma Ornelas or Miguel Ornelas Ledesma; Pautz was unsure which name the dispatcher gave. J.A. 56-57.

Pautz then checked the motel registration list and learned that Ismael Ornelas and a second man had registered at 4:00 a.m. Another officer, Don Hurrle, joined Pautz. The officers requested a check of the two names on the Narcotic and Dangerous Drug Information System (NADDIS). Two "hits" were reported by NADDIS: Miguel Ledesma Ornelas was identified as a suspected heroin dealer in El Centro, California. Ismael Ornelas, Jr., was identified as a suspected cocaine dealer in Tucson, Arizona. The officers also ran a warrant check on both names, but neither person was wanted for arrest. J.A. 58.

Later in the morning, two men left the motel and got into the Oldsmobile. By then, Pautz and Hurrle had been joined by a third officer, Lyle Luedke. Luedke and Hurrle positioned their vehicles on both sides of the Oldsmobile. Officer Hurrle approached the car, identified himself as a police officer, and asked the men for identification. The driver, Saul Ornelas, produced a driver's license in that name. The passenger, Ismael Ornelas-Ledesma, produced a driver's license in the name of Ismael Ornelas. After examining the proffered licenses, the officers requested and received consent to search the car. J.A. 58.

When Officer Luedke searched the interior of the car, he noticed a loose panel in the armrest area in the rear passenger side. According to Luedke, a screw holding the vent cover was rusty, which he believed indicated that the screw had been recently removed. Luedke forced open the vent cover by removing the screw and discovered a package of

cocaine concealed inside the cavity of the car. The petitioners were then arrested. J.A. 59.

A federal magistrate denied petitioners' suppression motion. He found reasonable suspicion for an investigatory detention. The magistrate also concluded, however, that there was no probable cause to remove the vent cover and that petitioners' consent did not extend to the cavity of the car. The magistrate nevertheless held that the cocaine would have been discovered under the inevitable discovery doctrine and denied the motion. A federal district court accepted the magistrate's recommendation to deny the suppression motion, but relied upon a different legal theory. Agreeing that there was reasonable suspicion for a stop, the district court concluded that the search of the car's inner cavity was supported by probable cause. J.A. 33-35.

The Seventh Circuit, following *United States v. Spears*, 965 F.2d 262 (7th Cir. 1992), reviewed the district court's findings of reasonable suspicion and probable cause under a clear error standard. Conceding that the issue of reasonable suspicion was "close," J.A. 65, the appellate court refused to disturb the district court's conclusion on this point. The appellate court ruled, however, that the record could not support the district court's probable cause finding. In that regard, the appellate court emphasized that Officer Luedke's testimony regarding the loose door panel was critical to the district court's probable cause finding. The magistrate, however, made no finding on the credibility of that testimony. Thus, the appellate court remanded the case to the district court to clarify whether that testimony was credible. J.A. 70-73.

On remand, the case was again referred to the magistrate, who recommended that the suppression motion be granted. The magistrate ruled that the record did not support a finding of probable cause. J.A. 83. The district court in turn rejected the magistrate's new recommendation.

While the district court conceded that the "issue [of probable cause] is a close one," J.A. 87, it reaffirmed its earlier finding that probable cause had been shown without ever conducting an evidentiary hearing. The court of appeals, applying a clear error test, upheld the district court's conclusion that there was probable cause to search the car's interior. J.A. 92.

In this Court, petitioners argue that the court of appeals should have treated the district court's holdings on reasonable suspicion and probable cause as legal conclusions subject to *de novo* review rather than as factual findings subject to a clear error test.

SUMMARY OF ARGUMENT

The Fourth Amendment proscribes unreasonable searches and seizures. A critical component of a valid search or seizure is the existence of probable cause. Under our legal system, this Court is responsible for defining the contours of probable cause. That duty requires carefully balancing the competing legal interests at stake. On the one hand, the Court has recognized that probable cause is an ancient safeguard that protects individual citizens from unfounded and arbitrary violations of their privacy and liberty. *Henry v. United States*, 361 U.S. 98, 100 (1959). On the other hand, probable cause is also designed to instruct police officers who are charged with promoting the community's legitimate law enforcement interests. As this Court has noted, the concept of probable cause is "the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

Because the existence *vel non* of probable cause (or its

companion standard, reasonable suspicion) is more than a collection of historic fact, this Court has never felt constrained to utilize a clear error standard when reviewing cases involving issues of probable cause. To the contrary, because probable cause involves the application of an objective legal standard to a given set of facts, *de novo* review has been the tradition of this Court for reviewing a lower court's finding concerning probable cause. As Chief Justice Rehnquist has described the matter, the development and definition of the probable cause norm requires that this Court "hold the balance true." *Illinois v. Gates*, 462 U.S. 213, 241 (1983).

Appellate courts should follow this same standard when they review probable cause and reasonable suspicion findings of trial courts. In concluding that clear error was proper for reviewing a district court's probable cause and reasonable suspicion findings, the court below ignored this Court's many rulings which have applied *de novo* review to the findings of lower courts.

The court below also misconstrued the significance of *Illinois v. Gates*. Although both this case and *Gates* involve probable cause determinations, the two cases arise in very different contexts. *Gates* involved the validity of a search warrant; this case involves the validity of a warrantless search. The holding in *Gates* that a magistrate's probable cause determination is entitled to deference when reviewing a search warrant ultimately rested on society's interest in encouraging the use of the warrant process. However, that rationale -- and that deference -- has no application to the sort of warrantless search at issue here. The Seventh Circuit's reliance on *Gates* is critically flawed precisely because it fails to recognize the significant differences between a probable cause finding made *ex ante* and a similar finding made *post hoc*.

Finally, the clear error rule used to review questions of

consent to search has no bearing on this case. A search is valid pursuant to consent when the individual's consent is voluntary and not a product of undue pressure. This is a question of historic fact that relates to the state of mind of the person. Probable cause and reasonable suspicion, in contrast, are objective legal norms that do not depend on the subjective views of any legal actor.

ARGUMENT

I. PROBABLE CAUSE IS A LEGAL JUDGMENT, NOT AN HISTORICAL FACT

Under this Court's well-established precedents, both probable cause and reasonable suspicion determinations involve a two-step process. First, there is an assemblage of the underlying facts. Resolving factual disputes, of course, "'is not this Court's concern.'" *Beck v. Ohio*, 379 U.S. 89, 100 (1964)(Harlan, J., dissenting), quoting *Watts v. Indiana*, 338 U.S. 49, 51-52 (1949); *Ker v. California*, 374 U.S. 23, 34 (1963). But "once such underlying factual issues have been resolved . . . the moment comes for determining whether, under the totality of the circumstances," *Miller v. Fenton*, 474 U.S. 104, 117 (1985), probable cause or reasonable suspicion exists. The second step of this process requires a legal judgment on the ultimate question: Are the facts contained in the record enough to convince a person of reasonable caution that a crime has been committed. *See Ker*, 374 U.S. at 35; *United States v. Cortez*, 449 U.S. 411, 418 (1981). That legal judgment can and should be subject to *de novo* review under the normal rules of appellate procedure, especially when core constitutional values are at stake.[2]

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[2] The fact that the probable cause standard is intimately tied to core con-
(continued...)

This Court's recent decision in *Thompson v. Keohane*, __ U.S. __, 64 U.S.L.W. 4027 (Nov. 29, 1995), is particularly instructive on this point. The issue in *Thompson* was whether a federal habeas court should exercise *de novo* review of a state court's determination that a defendant was not in custody for *Miranda* purposes at the time of his confession, or whether the determination of custody should be regarded as a factual question entitled to a presumption of correctness in habeas proceedings under 28 U.S.C. §2254(d). By a 7-2 vote, the Court ruled in favor of *de novo* review.

The reasoning that supported the Court's holding in *Thompson* applies with equal force here. As Justice Ginsburg explained in her majority opinion:

> Two discrete inquiries are essential to the determination [of custody]: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest

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[2] (...continued)
stitutional values is as indisputable as the history that led to the Fourth Amendment's adoption. As this Court has frequently explained: "The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required." *Henry v. United States*, 361 U.S. at 100. The probable cause norm was designed to reverse this practice.

> or restraint on freedom of movement' of the degree associated with a formal arrest." The first inquiry, all agree, is distinctly factual. State court findings on these scene- and action-setting questions attract a presumption of correctness under 28 U.S.C. §2254(d). The second inquiry, however, call for application of the controlling legal standard to the historical facts. This ultimate determination, we hold, presents a "mixed question of law and fact," qualifying for independent review.

64 U.S.L.W. at 4031 (footnotes and citations omitted).

Likewise, the issue presented by this case requires a determination of what the police knew and when they knew it. But those historical facts do not, by themselves, answer the question of probable cause. As in *Thompson*, the facts must be measured against an objective legal standard designed to preserve core constitutional values. That process, in turn, produces a legal conclusion that this Court has historically subjected to *de novo* review.

This case, therefore, does not require the Court to enunciate a new constitutional rule. It merely requires the Court to reaffirm its longstanding practice in probable cause cases.

II. PRIOR RULINGS INDICATE THAT THIS COURT APPLIES A *DE NOVO* STANDARD WHEN REVIEWING THE PROBABLE CAUSE AND REASONABLE SUSPICION CONCLUSIONS OF LOWER COURTS

Although this Court has not directly decided the issue, a review of its cases demonstrates that *de novo* review is the norm when this Court examines the probable cause and reasonable suspicion findings of lower courts.

A. This Court Has Consistently Exercised *De Novo* Review Of Probable Cause Determinations By Lower Courts When Considering The Validity Of Warrantless Searches

In *Ker v. California*, 374 U.S. 23, a nearly unanimous Court agreed that the Fourth Amendment conclusions of state courts would receive plenary review when addressed in this Court. Speaking for eight Justices, Justice Clark conceded that the Court does not consider disputed factual questions. He was emphatic, however, that the Court will "make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental -- *i.e.*, constitutional -- criteria established by this Court have been respected." *Id.* at 34. Applying the equivalent of a *de novo* test, the *Ker* Court "proceed[ed] to examine the *entire record*," *id.* (emphasis added), to determine whether there was probable cause to arrest Ker and whether exigent circumstances justified a warrantless, unannounced entry of Ker's home.[3]

While Justice Clark's statement in *Ker* remains the classic description of how this Court approaches lower courts' probable cause findings, the tradition of independent review of probable cause rulings predates the announcement found in *Ker*. This Court's seminal ruling in *Carroll v. United States*, 267 U.S. 132 (1925), applied a *de novo* test when deciding whether probable cause existed to search an automobile for contraband. There, the defendants were convic-

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[3] *See* 374 U.S. at 34-41 (after an extensive review of the record, plurality found sufficient probable cause to justify arrest, and that the warrantless, unannounced entry did not violate the constitutional test of reasonableness mandated by the Fourth Amendment); *id.* at 60-63 (opinion of Brennan, J.)(*de novo* review of the record reveals insufficient exigency to justify a warrantless, unannounced entry of Ker's home).

ted of violating the National Prohibition Act. In this Court, they contended that federal prohibition officers stopped and searched their car without reasonable cause that it contained contraband. Although the *Carroll* Court did not state what level of review it was utilizing, an examination of the opinion indicates that the Court conducted an independent examination of the record.[4]

If there was any doubt after *Carroll* that a probable cause finding of a lower court was not subject to a clear error test, that doubt was surely eliminated by *Brinegar v. United States*, 338 U.S. 160. With an undisputed factual record, two lower federal courts ruled that police officers lacked probable cause to believe that Brinegar was illegally transporting liquor into Oklahoma. This Court reversed, after spending six pages examining the historic facts leading up to the seizure of Brinegar's car, and comparing those facts with the facts of *Carroll*, *see Brinegar*, 338 U.S. at

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[4] Consideration of the probable cause issue by both the majority and dissenting Justices indicates independent review of the matter. Significantly, the majority opinion made no reference to any findings of the lower court, and it took judicial notice that Detroit was situated on the international border and an "active" locale for the distribution of illegal liquor into the country. *See* 267 U.S. at 160. Accordingly, the Court asserted:

> That the officers when they saw the defendants believed that they were carrying liquor *we can have no doubt*, and *we think* it equally clear that they had reasonable cause for thinking so. Emphasis is put by defendants' counsel on the statement made by one of the officers that they were not looking for defendants at the particular time when they appeared. *We* do not perceive that it has any weight.

Id. (emphasis added). Similarly, the dissenting Justices asserted: "The facts known by the officers who arrested [the defendants] were *wholly insufficient* to create a reasonable belief that they were transporting liquor contrary to law." *Id.* at 171 (emphasis added).

165-71.[5] In a noteworthy passage, the Court explained that unless there are significant variations in the facts of cases, "it cannot be that the Fourth Amendment's incidence turns on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." *Id.*[6]

After this trenchant statement, the *Brinegar* majority explained that the probable cause rule protects "citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime," while at the same time giving "fair leeway for enforcing the law in the community's protection." *Id.* at 176. While some cases may present close questions, "a line necessarily must be drawn by an act of judgment formed in the light of the particular situation and the account taken of all the circumstances." *Id.* (emphasis added).

Similarly, in *Beck v. Ohio*, 379 U.S. 89, a majority of the Court reversed a ruling by the Ohio Supreme Court upholding Beck's arrest and the subsequent search of his car.

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[5] Justice Jackson's dissent took the position that the majority was conducting plenary review. 338 U.S. at 187 (Jackson, J., dissenting)(noting that the majority had drawn inferences from the facts that the two lower courts, presumably in a better position to review those facts, had refused to draw).

[6] *Cf. Elkins v. United States*, 364 U.S. 206, 223-24 (1960), where, in the context of overruling the "silver platter" doctrine, the Court explained:

> In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed."

In this Court, Beck argued that his arrest was not supported by probable cause. In resolving this issue, the *Beck* Court looked to the standard articulated by Justice Clark in *Ker*. *Beck*, 379 U.S. at 92, quoting *Ker*, 374 U.S. at 34.

After acknowledging that the trial court made no factual findings on the issue of probable cause and commenting on the "meager" state of the record, *Beck*, 379 U.S. at 92-93, the *Beck* majority undertook an independent examination of the record, including a review of the testimony of one of the arresting officers, and concluded that Beck's arrest was not supported by probable cause. *Id.* at 93-97.

In an incisive dissent, Justice Harlan was mildly critical of the majority for not giving greater deference to state court factual findings that involve contested factual matters, or "on-the-spot considerations which no appellate court can estimate with assurance on a cold record." *Id.* at 101. But where the factual record is clear, Justice Harlan agreed that de novo review was proper. He wrote: "It is equally clear that in cases involving asserted violations of constitutional rights the Court is free to draw its own inferences from established facts, giving due weight to the conclusions of the state court, but not being conclusively bound by them." *Id.* at 100 (citations omitted).

B. This Court Applies A *De Novo* Test When Analyzing The Constitutionality Of Less Intrusive Detentions And Searches

While the Court normally requires probable cause for full scale seizures and searches, it has also recognized that a lesser degree of suspicion may support a detention or search that is minimally intrusive. The landmark ruling in *Terry v. Ohio*, 398 U.S. 1 (1968), held that a limited frisk of a person was permissible where a police officer reasonably suspects the individual is engaged in criminal conduct and is

presently armed and dangerous. *Id.* at 30. Although *Terry* was a sharp break from precedent in its willingness to allow a police intrusion in the absence of probable cause, it forcefully asserted that the lesser degree of suspicion it was proposing for limited intrusions derived its meaning from fundamental Fourth Amendment principles.[7] Thus, Chief Justice Warren cautioned:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

Id. at 21-22 (footnotes and citations omitted).

After *Terry* was decided, state and lower federal judges were confronted with a myriad of fact patterns that raised difficult questions about the scope and limits of the *Terry* doctrine. As many of these cases came to this Court, there was an obvious need to provide guidance to the rest of the

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[7] At the core of *Terry*'s willingness to allow searches and seizures on less than probable cause was the constitutional mandate that distinctive and prudent evidence support such intrusions. 398 U.S. at 21, n.18 ("This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence"). This statement indisputably reflects the legal nature of the reasonable suspicion standard.

judiciary on the meaning of *Terry*. When reviewing those cases, this Court has never applied a clear error test when confronted with a claim that reasonable suspicion did not support a challenged detention.

For example, in *United States v. Cortez*, 449 U.S. 411, this Court reversed the court of appeals' conclusion that reasonable suspicion was lacking to justify a detention of the defendants' vehicle. *Cortez* explained that the legal concept of reasonable suspicion contains two elements. First, there is an assessment of all of the historic facts, information and experience possessed by the law enforcement officers. After the totality of the circumstances have been assembled, then there is a judicial judgment of whether the "whole picture . . . yield[s] a particularized suspicion" that justifies subjecting the individual to the challenged intrusion. Applying this framework, the *Cortez* Court conducted its own extensive review of the factual record, *see id.* at 418-21, and decided that the record contained sufficient evidence to justify stopping the defendants.[8]

Recent decisions continue the tradition of independent review of a lower court's finding on reasonable suspicion. These cases recognize that the concept of reasonable suspicion is a legal precept, rather than a description of historic fact. One example is *United States v. Sokolow*, 490 U.S. 1 (1989). *Sokolow* reversed a determination by the Ninth Circuit that federal drug enforcement agents did not have reasonable suspicion to detain Sokolow. The appellate court

[8] Interestingly, the appellate court stated that it applied clear error review on the question of reasonable suspicion. While the *Cortez* Court acknowledged that fact, 449 U.S. at 416, quoting 595 F.2d 505, 507 (9th Cir. 1979), it abstained from endorsing that standard. On the contrary, the *Cortez* Court's lengthy recounting and meticulous scrutiny of the facts suggests that the Court felt free to render its own independent judgment of the quantum and quality of the evidence in the record.

had ruled that, unless evidence of "'ongoing criminal activity,' such as the use of an alias or evasive movement through an airport," was exhibited by a suspect, *id.* at 6, quoting 831 F.2d 1413, 1419 (9th Cir. 1987), a temporary seizure was impermissible.

Speaking for the majority, Chief Justice Rehnquist explained that "[t]he concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.'" 490 U.S. at 7, quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Rather than turning on the factual characterization of different types of behavior, the Chief Justice instructed that the concept of reasonable suspicion depends on the "probative value" and "evidentiary significance" of the facts in the record. Put simply, the legal norm of reasonable suspicion, like the legal principle of probable cause, depends on "'the *degree of suspicion* that attaches to particular types of noncriminal acts.'" *Sokolow*, 490 U.S. at 10, quoting *Gates* at 243-44, n.13 (emphasis added). With these legal principles in mind, the *Sokolow* Court then reviewed the facts and independently found sufficient proof to uphold the temporary seizure of Sokolow.[9]

[9] In contrast to the situation in *Cortez*, the lower court in *Sokolow* stated that it was applying *de novo* review on the issue of reasonable suspicion. 831 F.2d at 1417 (footnote and citations omitted). Although this Court did not expressly approve or disapprove of the standard utilized below, it obviously did not hesitate to reverse the Ninth Circuit's legal conclusion and exercised its own independent assessment of the reasonable suspicion question without any deference to the contrary finding below. *See also Reid v. Georgia*, 448 U.S. 438, 441 (1980)(*per curiam*)(reversing lower court finding of reasonable suspicion; concluding that the officer "could not, *as a matter of law*, have reasonably suspected the petitioner of criminal activity" on the basis of the facts in the record) (emphasis added); *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984)(*per curiam*)(reversing lower court's conclusion that there was no reasonable suspicion supporting the detention of the defendants).

As the above cases teach, *de novo* review of the reasonable suspicion norm is important because it guarantees a consistent, case-by-case development of Fourth Amendment rules. Indeed, *de novo* review is indispensable because of the "exceedingly small number of cases in this Court indicating what suffices for probable cause [or reasonable suspicion]." *Sibron v. New York*, 398 U.S. 40, 74 (1968)(Harlan, J., concurring in result). Although the concepts of probable cause and reasonable suspicion involve an initial collection of historic fact and experience, this point should not prompt the Court to alter its traditional process of independently reviewing the ultimate legal question at stake.[10] As Professor Monaghan has noted, *de novo* review is necessary because "norm elaboration occurs best when the Court has power to consider fully a series of closely related situations involving a claim of constitutional privilege." Henry P. Monaghan, "Constitutional Fact Review," 85 Colum.L. Rev. 229, 273 (1985). *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), illustrates how the Court combines a case-by-case model and *de novo* review when interpreting the Fourth Amendment.

In *T.L.O.*, this Court addressed for the first time the application and scope of the Fourth Amendment concerning searches and seizures by public school officials. The New

[10] *See Alabama v. White*, 496 U.S. 325 (1990). In *White*, the Alabama Court of Criminal Appeals, after a careful review of the facts and record, *see* 550 So. 1074, 1078-79 (1989), reversed a trial court's order denying White's suppression motion. The Alabama appellate court found that an anonymous tip, notwithstanding subsequent police corroboration of certain details, did not provide reasonable suspicion to justify a *Terry* stop. Acknowledging that the issue of reasonable suspicion in *White* was "a close case," *White*, 496 U.S. at 332, this Court reversed the lower court and found, without any deference to the opposite finding below, that the anonymous tip, as corroborated, justified a stop of the defendant's car.

Jersey Supreme Court had found that the search of T.L.O.'s purse was unreasonable under the facts of the case. In reversing the decision of the New Jersey court, this Court announced that the constitutionality of a school search depends on "the reasonableness, under all the circumstances, of the search." *Id.* at 341-42. If clear error review was the proper method for interpreting Fourth Amendment norms, one might have expected a remand of *T.L.O.* to provide the New Jersey courts an opportunity to analyze the facts under the Court's new standard. Instead, recognizing that the New Jersey Supreme Court had applied a legal standard "not substantially different from the standard" it had adopted, *id.* at 343, this Court reached a different legal conclusion after independently examining the facts and found sufficient evidence to validate the challenged search. *Id.* at 343-48.

III. *ILLINOIS v. GATES* DID NOT ALTER THE TRADITIONAL METHOD FOR REVIEWING PROBABLE CAUSE AND REASONABLE SUSPICION DETERMINATIONS INVOLVING WARRANTLESS INTRUSIONS

A. Using A Totality Of The Circumstances Test To Evaluate Probable Cause And Reasonable Suspicion Determinations Does Not Conflict With The Requirement Of *De Novo* Review

Illinois v. Gates, 462 U.S. 213, concerned whether a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous tip could satisfy the probable cause rule. *Gates* reaffirmed that probable cause is to be judged from the totality of the circumstances.[11] Although

[11] 462 U.S. at 238. As is the case with probable cause, reasonable suspi-
(continued...)

Gates found "it is wiser to abandon the 'two-pronged test'" for judging probable cause findings established in previous decisions,[12] it did not disturb the longstanding principle that the probable cause determination remains an objective test.[13] Similarly, a temporary detention or limited search is permissible only where the evidence indicates an "objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."[14]

Gates also reiterated that a magistrate's probable cause finding was entitled to substantial deference. 462 U.S. at 236. But contrary to the Seventh Circuit's view, the reaffirmation of a totality of the circumstances test for determining probable cause in *Gates* does not imply deferential review for judging the evidence supporting a warrantless police intrusion.[15] Indeed, *Gates* can most fairly be read to point

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[11] (...continued)
cion is also judged by a totality of the circumstances rule. *See Alabama v. White*, 496 U.S. at 332 ("[W]e concluded that under the totality of the circumstances, the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car"); *Sokolow*, 490 U.S. at 8 (when evaluating the constitutionality of a detention, "we must consider 'the totality of the circumstances -- the whole picture'"), quoting *Cortez*, 449 U.S. at 417.

[12] The so-called "two-pronged" test for determining probable cause emerged from the reasoning of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969).

[13] *See, e.g., Brinegar*, 338 U.S. at 175 ("Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed")(citation omitted)(brackets in original); *Illinois v. Rodriguez*, 497 U.S. 177, 184-86 (1990).

[14] *Cortez*, 411 U.S. at 417 (footnote and citation omitted).

[15] *See Thompson v. Keohane*, 64 U.S.L.W. at 4031 n.11 (use of a totality (continued...)

in precisely the opposite direction. The intent of *Gates* was to encourage use of the warrant process.[16] Accordingly, the criticism in *Gates* of *de novo* review was directed at the type of "grudging or negative" and "hypertechnical" review that might well prompt police officers to forgo the warrant process. *Id.* at 236. Where officers engage in warrantless searches, however, the *raison d'etre* for great deference to the magistrate is gone. An officer's belief that probable cause or reasonable suspicion existed is not enough. While police officers are entitled to draw "the usual inferences which reasonable men draw from evidence," *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), when they act outside of the warrant process, their subjective beliefs are not enough.[17]

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[15] (...continued)
standard for deciding whether a person is in custody under *Miranda v. Arizona*, 384 U.S. 436 (1966), does not mean deferential review is proper); *Miller v. Fenton*, 474 U.S. at 117 (employing a totality standard for deciding whether a confession is voluntary under the Fifth Amendment's Due Process Clause does not preclude independent review by federal habeas court).

[16] 462 U.S. at 236. It is well known that many police officers prefer to bypass the warrant process. *See, e.g.*, Richard Van Duizend, L. Paul Sutton & Charlotte A. Carter, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 66 (1983). Many of this Court's cases, including *Gates*, have tried to counter this phenomenon. *See, e.g., United States v. Leon*, 468 U.S. 897 (1984)(holding that where an officer has acted in objective reliance on a search warrant issued by a neutral and detached magistrate, evidence secured pursuant to warrant is admissible at trial even if it is later determined that the warrant was issued without probable cause); *United States v. Ventresca*, 380 U.S. 102 (1965)(in a close or marginal situation, a search authorized by a warrant may be upheld where without one it would fail).

[17] *Beck*, 379 U.S. at 97 ("If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people (continued...)

B. Seventh Circuit Rulings Ignore This Court's Longstanding Preference For A Magistrate's Approval Before An Intrusion Instead Of The Warrantless Decision To Search And Seize

The reasoning supporting the Seventh Circuit's adoption of a clear error standard is not only out of step with the purposes announced in *Gates*, it also ignores critical considerations that have informed this Court's judgment when explaining the meaning and value of the probable cause norm. In the case that provides the foundation for the ruling below, the Seventh Circuit opined that, because a magistrate's warrant is owed substantial deference, even though it is issued after an *ex parte* hearing,

> it would be anomalous to require a more searching review of a district judge's probable cause determination. Because there is little to distinguish a magistrate's probable cause determination in a warrant case and a district judge's probable cause determination in a non-warrant case, appellate review should be the same for both.

United States v. Spears, 965 F.2d at 270 (citation omitted).

The flaw in this reasoning is the failure to recognize the significant differences between a probable cause finding made *ex ante* and a similar finding made *post hoc*. First, a magistrate's finding of probable cause is the preferred mode because it "interposes an orderly procedure,"[18] overseen by

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[17] (...continued)
would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police").

[18] *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

a neutral and detached official, rather than a process generated by the "hurried action of officers and others who may happen to make arrests [or searches]."[19] In addition, the *ex ante* probable cause finding is favored because it allows an objective evaluation of the need to search *before* an intrusion of privacy occurs.[20]

The Seventh Circuit correctly notes that the degree of evidence needed to support a probable cause finding is the same whether made a magistrate in an *ex parte* hearing, or made by a district court after-the-fact. *Spears*, 965 F.2d at 270. But this truism forgets that the warrant process protects and encourages constitutional values that are lost and become irreplaceable once officers act on their own. An *ex ante* process ensures that a record of the need to intrude is compiled before the intrusion. This not only diminishes the opportunity for potential police misconduct, it also guarantees that the probable cause finding will not occur in the "far less reliable procedure of an after-the-event justification for the arrest or search, [which is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck*, 379 U.S. at 96. Thus, the rationale that underlies the decision below has neglected bedrock considerations put in place by this Court to ensure that the probable cause rule is applied in an objective manner that protects individual liberty without unduly restraining legitimate law enforcement interests. *De novo* review promotes the ultimate goal of this process, which is an objective judgment on whether law enforcement officers have adhered to constitu-

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[19] *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

[20] It has been said that once an unreasonable intrusion has occurred, an after-the-fact remedy -- whether in the guise of the exclusionary rule or a damages actions brought against the offending officers -- may offer little solace or relief for the constitutional harm because "[r]eparation comes too late." *Linkletter v. Walker*, 381 U.S. 618, 637 (1965).

tional commands. Moreover, *de novo* review offers the additional advantage of providing guidance to the police, helps to unify precedent and stabilizes the contours of constitutional principles. *Thompson v. Keohane*, 64 U.S.L.W. at 4032.

IV. THE CLEAR ERROR TEST USED TO REVIEW QUESTIONS OF CONSENT UNDER THE FOURTH AMENDMENT IS NOT RELEVANT TO THIS CASE

A. The Issue Of Consent Concerns A Suspect's Mental State

As the Court's cases show, the determination of probable cause involves no inquiry into the subjective state of mind of a legal actor. Moreover, the standard for reviewing a finding of consent has no bearing on this case. In *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973), this Court described the question of consent to search as factual in nature and implied that a finding of consent was subject to clear error review. Such a standard makes sense because courts determine consent by asking whether undue pressure affected an individual's mental state and thus played a role in the procurement of consent. "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." *Id.* at 227. Accordingly, a trial court's finding of consent is given the same deference afforded other findings that "depend[] heavily on the trial court's appraisal of witness credibility and demeanor." *Thompson v. Keohane*, 64 U.S.L.W. at 4030; *cf. Thompson v. Louisiana*, 469 U.S. 17, 23 (1984)(*per curiam*)(the issue of consent "is ordinarily a factual issue unsuitable for [the Court's]

consideration in the first instance").[21]

In contrast, the probable cause and reasonable suspicion norms are considered under an objective standard that asks "whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289, n.19 (1982). The subjective beliefs of the police are not relevant. *Beck*, 379 U.S. at 97. Therefore, the determination of either of these Fourth Amendment norms, like the determination of whether a person has been seized within the meaning of the Fourth Amendment, is a conclusion of law meriting *de novo* review.[22]

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[21] The institutional and efficiency concerns that have moved the Court to defer to the factual findings of lower courts on questions like juror bias and competency are not controlling in the context of Fourth Amendment suppression motions. Only judges or magistrates decide the relevant legal questions, "and they do so with a view to identifying recurrent patterns, and advancing uniform outcomes." *Thompson v. Keohane*, 64 U.S.L.W. at 4031 n.13. In this case, the district court decided the petitioners' probable cause claim without conducting an evidentiary hearing. J.A. 29, n.1; J.A. 86. *See Thompson*, 64 U.S.L.W., n.12 (noting that a trial court's superior capacity to resolve credibility issues on the issue of custody of *Miranda* is not a concern when the trial court resolves that issue without conducting an evidentiary hearing).

[22] *Cf. United States v. Mendenhall*, 446 U.S. 544, 551-52, n.5 (1980) (opinion of Stewart, J.)("[T]he correctness of the legal characterization of the facts appearing in the record [on whether a seizure occurred] is a matter for this Court to determine")(citations omitted); *id.* at 565, n.5 (Powell, J., concurring in part and concurring in the judgment)(referring to the district court's finding of reasonable suspicion as a "conclusion of law").

B. When The Overall Reasonableness Of Police Behavior Is At Issue, The Rationale Of *Bustamonte* Has Been Confined To Purely Factual Questions

Furthermore, it would be illogical to draw from *Bustamonte* the broader proposition that probable cause and reasonable suspicion are factual findings entitled to clear error review when this Court has limited the applicability of this level of review to the narrow question of whether consent was in fact given. When faced with the larger question of the validity of consent to a search based upon the reasonable, but mistaken, view that a third party possessed common authority over the premises, this Court has made it clear that an objective standard applies and the conclusions drawn under that standard are conclusions of law.

In *Illinois v. Rodriguez*, 497 U.S. 177, the lower courts found that, because Rodriguez' ex-girlfriend did not possess common authority over the apartment she and Rodriguez had once shared, the police could not reasonably rely on her apparent authority to consent to search the home. This Court reversed that conclusion. Speaking for the majority, Justice Scalia conceded that the question whether an officer has a reasonable belief of a third-party's common authority to consent to a search "is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment." *Id.* at 186. But the factual nature of the issue did not compel deference to the lower courts' Fourth Amendment conclusions.

On the contrary, the Court held that a mistaken police judgment on the issue of third-party consent does not vitiate the search provided the mistake is a reasonable one. As explained in *Rodriguez*:

> [Prior cases establish] that in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable . . . .
>
> As with other factual determinations bearing upon search and seizure, determination of consent to enter must "be judged against an objective standard: would the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief'" that the consenting party had authority over the premises?

Id. at 188, quoting *Terry v. Ohio*, 392 U.S. at 21-22.

Similarly, in *Florida v. Jimeno*, 500 U.S. 248, 250 (1991), the Florida courts had ruled that consent to a general search of a car did not extend to sealed containers found inside the car. This Court reversed and held that a search is valid when, "under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open a particular container within the automobile." *Id.* at 249. Though this standard requires an assessment of all the facts available to an officer, *Jimeno* did not imply that deferential review was proper. *Jimeno* explained that "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Id.* at 251.

The use of an objective standard in both *Rodriguez* and *Jimeno* is not surprising. Those decisions simply follow a tradition of independent review of lower court legal findings. Rather than suggesting that clear error is proper for this case, the reasoning of *Bustamonte* has been confined to questions concerning a historic fact relating to an actor's mental state.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Seventh Circuit should be reversed.

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BRIEF

(10)

No. 95-5257

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In The
Supreme Court of the United States
October Term, 1995

SAUL ORNELAS and ISMAEL ORNELAS-LEDESMA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., IN SUPPORT OF AFFIRMANCE OF THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS BELOW.

(List of Counsel on Inside Front Cover)

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